Neat Ai Suan v Public Prosecutor

HIGH COURT (SHAH ALAM) — CRIMINAL APPEAL NO 41-7 OF 1992
LOW HOP BING J
2 AUGUST 1999

Criminal Procedure *— Trial — Close of prosecution's case — Standard of proof — Offence committed before 31 January 1997 — Whether prima facie case standard or beyond reasonable doubt standard applicable — Whether amendment to s 173(f) of the Criminal Procedure Code retrospective*

Criminal Procedure *— Trial — Misdirection — Misdirection on the standard of proof at close of prosecution's case — Whether curable*

The accused had been charged and convicted of theft under s 380 of the Penal Code and sentenced to six months' imprisonment and to a fine of RM3,000 in default 12 months' imprisonment. The offence was committed between 15 September 1986 and 4 July 1987, ie before the coming into force of the amendment to s 173(f) of the Criminal Procedure Code on 31 January 1997. In calling for the accused to enter on his defence, the magistrate had found that the prosecution had succeeded in proving a prima facie case against the accused. The accused appealed to the High Court contending that the magistrate had misdirected himself on the standard of proof at the close of the case for the prosecution.

Held, allowing the appeal and ordering a retrial before a different magistrate:

(1) Since the offence was allegedly committed between 15 September 1986 and 4 July 1987, ie before the coming into force of the amendment to s 173(f) of the Criminal Procedure Code on 31 January 1997, the provisions of the original s 173(f) would apply. Section 173(f) as amended was not intended to be restrospective (see p 558D–F).

(2) Since the offence was allegedly committed well before 31 January 1997, the learned magistrate at the close of the prosecution's case ought to have satisfied himself upon a maximum evaluation of the evidence before him that the prosecution had proved the charge beyond reasonable doubt against the accused before calling for his defence; *Dalip Bhagwan Singh v PP* [1998] 1 MLJ 1 followed (see p 559E–G).

(3) Section 422 of the CPC could not be invoked to cure the misdirection as the misdirection went to the root of the matter and involved a principle of general importance in the administration of justice; *Harun bin Abdullah v PP* [1998] 3 MLJ 1 and *Surandran a/l Rajaretnam v PP* [1998] 2 MLJ 49 followed (see pp 560A–B, 556–G).

[Bahasa Malaysia summary

Tertuduh telah dipertuduh dan disabitkan dengan kesalahan mencuri di bawah s 380 Kanun Keseksaan dan dijatuhkan hukuman penjara enam bulan dan denda sebanyak RM3,000 jika ingkar pemenjaraan 12 bulan. Kesalahan tersebut telah dilakukan di antara 15 September 1986 dan 4 Julai 1987, iaitu sebelum pindaan kepada s 173(f) Kanun Acara Jenayah mula berkuatkuasa pada 31 Januari 1997. Dalam memanggil supaya tertuduh memasukkan pembelaan, majistret telah mendapati bahawa pihak pendakwa raya telah berjaya membuktikan kes prima facie terhadap tertuduh. Tertuduh merayu kepada Mahkamah Tinggi dengan berhujah bahawa majistret telah menyalah arah dirinya atas darjah pembuktian di penutup kes pihak pendakwa raya.

Diputuskan, membenarkan rayuan dan memerintahkan perbicaraan semula di hadapan majistret lain:

(1) Memandangkan kesalahan tersebut kononnya telah dilakukan di antara 15 September 1986 dan 4 Julai 1987, iaitu sebelum pindaan kepada s 173(f) KAJ mula berkuatkuasa pada 31 Januari 1997, peruntukan asal s 173(f) adalah terpakai. Seksyen 173(f) seperti yang terpinda tidak dihasratkan untuk berkuatkuasa secara kebelakangan (lihat ms 558D–F).

(2) Oleh kerana kesalahan tersebut kononnya dilakukan jauh sebelum 31 Januari 1997, majistret yang arif di penutup kes pihak pendakwa raya sepatutnya telah memuaskan dirinya berdasarkan suatu penilaian maksima keterangan di hadapan beliau bahawa pihak pendakwa telah membuktikan pertuduhan melampaui keraguan munasabah terhadap tertuduh sebelum memanggil untuk pembelaannya; *Dalip Bhagwan Singh v PP* [1998] 1 MLJ 1 diikut (lihat ms 559E–G).

(3) Seksyen 422 KAJ tidak boleh digunakan untuk memulihkan salah arahan tersebut kerana salah arahan itu berkaitan dengan dasar hal tersebut dan membabitkan satu prinsip yang penting secara am dalam pentadbiran keadilan; *Harun bin Abdullah v PP* [1998] 3 MLJ 1 dan *Surandran a/l Rajaretnam v PP* [1998] 2 MLJ 49 diikut; (lihat ms 560A–B, 559G).]

Notes

For cases on criminal trial generally, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 3206–3638.

Cases referred to

Arulpragasan a/l Sandaraju v PP [1977] 1 MLJ 1 (refd)
Baharuni bin Ismail v PP [1997] 2 MLJ 265 (refd)
Dalip Bhagwan Singh v PP [1998] 1 MLJ 1 (folld)

A *Harun bin Abdullah v PP* [1998] 3 MLJ 1 (folld)
Ishak Shaari v PP [1997] 3 CLJ Supp 223 (refd)
Khoo Hi Chiang v PP and another appeal [1994] 1 MLJ 265 (refd)
Surandran a/l Rajaretnam v PP [1998] 2 MLJ 49 (folld)

B **Legislation referred to**

Criminal Procedure Code ss 173(f), 180, 422
Penal Code s 380

Gobind Singh Deo (*Karpal Singh & Co*) for the appellant.
C *Mohd Hanafiah Zakaria* (Deputy Public Prosecutor) for the respondent.

Low Hop Bing J:

Appeal

D This is an appeal by the accused against the decision of the learned magistrate at Petaling Jaya on 31 December 1991 when the accused was found guilty and convicted of an offence under s 380 of the Penal Code, and was sentenced to six months' imprisonment and fined RM3,000 or, in default of payment, 12 months' imprisonment.

E

Sole ground of appeal

Although the petition of appeal filed herein covers a total of five typewritten pages, in single spacing, the accused is relying solely on one ground, ie that the learned magistrate at the close of the case for the prosecution has
F misdirected himself on the standard of proof in that the learned magistrate held at p 13 of the appeal record as follows:

> Setelah mendapati pihak pendakwa telah berjaya membuktikan kes prima facie terhadap tertuduh di bawah s 380 Kanun Keseksaan, mahkamah telah memanggil tertuduh untuk membela diri di bawah s 380 Kanun Keseksaan.

G [Translation:

> After finding that the prosecution had succeeded in proving a prima facie case against the accused under s 380 of the Penal Code, the court called upon the accused to enter his defence under s 380 of the Penal Code.]

H Again at p 176 of the record of appeal, the learned magistrate stated:

> Pendakwa berjaya membuktikan kes prima facie terhadap tertuduh — oleh itu mahkamah memerintah tertuduh untuk membela diri di bawah s 380 Kanun Keseksaan.

[Translation:

I
> The prosecutor has succeeded in proving a prima facie case against the accused — hence, the court orders the accused to enter his defence under s 380 of the Penal Code.]

Standard of proof

The charge preferred against the accused reads as follows:

> Bahawa kamu di antara 15 September 1986 hingga 4 Julai 1987 di rumah No 9 Jalan SS1/27, Kampung Tunku, dalam Daerah Petaling, dalam Negeri Selangor Darul Ehsan telah mencuri barang-barang rumah kepunyaan Mohd Ali bin Hashim, K/P No 3552820 bernilai RM26,900 seperti dalam lampiran A, oleh itu kamu telah melakukan satu kesalahan yang mana kamu boleh dihukum di bawah s 380 Kanun Keseksaan.
>
> [Translation:
>
> > That you between 15 September 1986 and 4 July 1987 at house No 9, Jalan SS1/27, Kampung Tunku, in the District of Petaling, in the State of Selangor Darul Ehsan, committed theft of the household effects belonging to Mohd Ali bin Hashim, I/C No 3552820 valued at RM26,900 as in annexure A and that you have thereby committed an offence punishable under s 380 of the Penal Code.]

Since the offence alleged in the charge was said to have been committed between 15 September 1986 and 4 July 1987, ie before the date of the coming into force of the amendment to s 173(f) of the Criminal Procedure Code vide Criminal Procedure Code (Amendment) Act 1997, on 31 January 1997, the provisions of the original s 173(f) would apply here. Prior to the said Amendment Act, the original s 173(f) read as follows:

> (1) When the case for the prosecution is concluded the Court, if it finds that no case against the accused has been made out which if unrebutted would warrant his conviction, shall record an order of acquittal, or, if it does not so find, shall call on the accused to enter on his defence.
>
> (2) If, upon taking all the evidence hereinbefore referred to, the Court finds that no case against the accused has been made out which if unrebutted would warrant his conviction the Court shall record an order of acquittal.

Along with s 180 (which applies to the close of the case for the prosecution in a trial before the High Court), the original s 173(f) came up for consideration in *Khoo Hi Chiang v PP & Anor* [1994] 1 MLJ 265, in which the Federal Court held that the duty of the court at the close of the case for the prosecution is to undertake not a minimal evaluation of the evidence tendered by the prosecution, but a maximum evaluation of such evidence to determine whether or not the prosecution had established the charge against the accused beyond all reasonable doubt.

In *Arulpragasan a/l Sandaraju v PP* [1997] 1 MLJ 1, the Federal Court, comprising a seven-man bench, by a 4:3 majority decision, affirmed the decision in *Khoo Hi Chiang v PP.*

It was pursuant to the decision in *Arulpragasan* that Parliament moved to amend s 173(f) of the Criminal Procedure Code to read as follows:

> When the case for the prosecution is concluded the Court shall consider whether the prosecution has made out a prima facie case against the accused. If the Court finds that the prosecution has not made out a prima facie case against the accused, the Court shall record an order of acquittal.

Section 173(f) as amended above is not intended to be retrospective: *Baharuni bin Ismail v PP* [1997] 2 MLJ 265. In relation to s 180, the Federal Court held as follows:

> It was never in doubt that Parliament in its wisdom had not made the amendment to s 180 of the CPC to provide for a prima facie standard of proof at the close of the case for the prosecution retrospective. Therefore, the amendment having been gazetted on 30 January 1997 would for all practical purposes come into effect only on 31 January 1997. Thus, the amendment would only be applicable to cases filed after that date and not to cases before that date and this would include decided cases pending appeal. In all cases before 31 January 1997, the 'beyond a reasonable doubt' standard of proof must of necessity apply as all along there can be only one interpretation of s 180 of the CPC, and that is as decided by the majority decision in *Arulpragasan* (see p 270D–F).

Thereafter, in *Dalip Bhagwan Singh v PP* [1998] 1 MLJ 1, the Federal Court again pronounced:

> Moreover, although the Criminal Procedure Code (FMS Cap 6) ('the CPC') has been amended to include the test of prima facie case, the amendment would apply only to an act or omission constituting a criminal offence committed on or after 31 January 1997, and not to any such act or omission before 31 January 1997. For such act or omission committed before 31 January 1997, the test as laid down in *Arulpragasan*, ie that of proof beyond a reasonable doubt at the close of the prosecution's case, would still apply because the amendment is no t couched in terms, either expressly or by necessary implication, which would make it retrospective in operation (see pp 15C-D and 16B–E).

It is clear that the charge preferred against the accused in this appeal refers to an offence committed between 15 September 1986 and 4 July 1987, which was well before 31 January 1997. As such, the decision in *Dalip Bhagwan Singh v PP* applies and the learned magistrate ought to have satisfied himself, upon a maximum evaluation of the evidence before him, at the close of the prosecution's case, to determine if the prosecution has proved the charge beyond reasonable doubt against the accused, before deciding to call for the defence. The learned magistrate had therefore misdirected himself when he applied the prima facie standard of proof at the close of the case for the prosecution: *Harun bin Abdullah v PP* [1998] 3 MLJ 1 (CA); *Surandran a/l Rajaretnam v PP* [1998] 2 MLJ 49 (CA); *Ishak Shaari v PP* [1997] 3 CLJ Supp 223 (HC).

Section 422 of the Criminal Procedure Code

In the light of the aforesaid misdirection by the learned magistrate, the issue which arises for consideration is whether s 422 of the Criminal Procedure Code is capable of curing this misdirection.

In *Harun bin Abdullah v PP*, the Court of Appeal held as follows:

> Section 422 of the CPC cannot be invoked to cure a breach where it involves a principle of general importance in the administration of justice. As the error committed by the learned sessions court judge in misdirecting herself on the

standard of proof on the prosecution fell within both classifications in the instant appeal, it was not capable of rectification under s 422 of the CPC (see p 9F – G); *Ishak Shaari v PP* [1997] 3 CLJ Supp 223 followed.

Further, in *Surandran a/l Rajaretnam v PP*, the Court of Appeal held that there was clear misdirection by the trial judge and that a misdirection of this nature, which goes to the very root of the matter, is incapable of being cured by the provision of s 422 of the Criminal Procedure Code, as the misdirection involves a principle of general importance in the administration of justice.

Conclusion

On the foregoing grounds, I hold that the conviction and sentence imposed by the learned magistrate cannot be sustained in law and are hereby set aside. The fine if paid shall be refunded to the accused. I also order a retrial of the charge against the accused before another magistrate in the Petaling Jaya magistrate's court. The accused who has been released on bail pending appeal to this court shall now be ordered to appear before the Petaling Jaya magistrate's court on 16 August 1999 and pending the said appearance, the accused is granted the same bail as aforesaid.

Conviction and sentence set aside.

Reported by Andrew Christopher Simon